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New Directions in Worker Participation and Collective Bargaining

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Lecture

NEW DIRECTIONS IN WORKER PARTICIPATION AND COLLECTIVE BARGAINING†

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I. INTRODUCTION

The contribution that collective bargaining has made to American society has been well-documented: it has provided a degree of industrial democracy for the unionized work force; limited arbitrary discipline and management actions on the shop floor; improved the living standards and well-being of millions of Americas, both directly and through its indirect "ripple" effect; and much more.[1]

However, collective bargaining has not effectively influenced the management and direction of the American enterprise. Part of this has been related to the philosophy of American management and labor representatives;[2] part to legal limitations which have hampered movements in this direction;[3] and part to the low percentage of the unionized and the represented work force.[4] These limitations have caused some to explore the possibility of co-determination and work councils among unorganized workers,[5] and have caused others to reject the collective bargaining model altogether as a barrier which keeps the work force from marshalling its full strength to establish worker-controlled industries.[6] In the last decade, however, American companies and unions have been experimenting with an increased degree of worker participation in the management of the enterprise. A variety of reasons explains such developments, including:

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[1] For recent discussions of the value of collective bargaining, *see, e.g.*, Weiler, *Promises to Keep: Securing Workers' Rights to Self-organization Under the NLRA*, 96 HARV. L. REV. 1769, 1822-27 (1983); Getman, *The Courts and Collective Bargaining*, 59 CHI.-KENT L. REV. 969 (1983); and R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 246-51 (1984).

[2] M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965, 457-58 (1970).

[3] See discussion in Part III, *infra*.

[4] A survey conducted by the Bureau of National Affairs showed union membership in 1982 dropped below 20 million members in the United States for the first time since 1968; only 19.8 million U.S. workers were union members. The survey also showed that organized labor's share of the civilian work force was a new modern-era low of 17.9% in 1982, and that unions represented about 27% of those eligible for membership. 117 LAB. REL. REP. (BNA) 81 (1984).

[5] Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155 (1982); Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 37 (1979).

[6] *See, e.g.*, Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). *But see*, Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984).

1) Increased foreign competition, technological changes, and increased domestic competition caused in part by deregulation, have forced companies and unions to look for better ways to improve productivity and quality at a better price, while also improving conditions of work. In this effort, companies and unions have looked to labor relations and management techniques employed by successful competitors abroad, especially to Japan and West Germany. Most of the developing solutions, however, have grown out of the American experience.

2) Since World War II, the American work force has become increasingly better educated, and American managerial and union theorists and practitioners have focused on how the ability, education and experience of workers can better be utilized to improve the prospects of success for both the company and its workers.

3) In the last decade in particular, there has been greater emphasis on providing a more humane working environment in which employees achieve greater work satisfaction, and therefore life satisfaction, as a result of their jobs.

This discussion will first focus on the developing forms of worker participation, including (1) placement of workers on boards of directors, (2) worker ownership, and (3) quality of work life programs, which include work organization methods (such as quality circles) and profit-sharing and productivity gain-sharing plans. Following that, the discussion will conclude with how the legal structure for collective bargaining in the United States could hamper the development of worker participation to the detriment of companies, unions, workers and the public in the United States.

II. Developing Forms of Worker Participation in America

A. *Workers on Company Boards of Directors*

In 1979 the Chrysler Corporation, in great financial distress, asked the President of the United Auto Workers, Douglas Frazier, to serve on its Board of Directors. After some initial reluctance, Mr. Frazier agreed to do so. At the time, many considered this to be a unique situation, not likely to create a pattern in American labor relations. Some also questioned whether having one union member on the Board of Directors would make much of an impact on corporation policy. NBC-TV created a special on Lee Iacocca, the president of Chrysler Corporation, in which there appeared an exchange among the Chrysler directors. The condescending manner with which Mr. Iacocca treated Mr. Frazier in that exchange, and the sight of one union member arrayed against a dozen or more other directors, lent weight to this perspective. However, Mr. Frazier, whose term expired in early 1985, believed his experience was constructive, informative and useful to the UAW members at Chrysler, as well as to the corporation.[7] The Chrysler local union leadership also

[7] 116 Lab. Rel. Rep. (BNA) 92 (1984).

voted to urge that the principle of union participation on the Chrysler Board be continued.[8] In recent interviews,[9] Frazier indicated that he still strongly supports the concept. He said that he received all the information necessary to be fully informed, and when a report failed to provide the backup material that he wanted, it was swiftly provided upon his request. He resolved potential conflict questions by abstaining from consideration of collective bargaining plans and tactics, as well as refraining from discussion of a 1982 UAW strike against Chrysler that began in Canada. However, he mentioned several instances where he engaged in vigorous debate within the Board on issues of very great importance to his members, such as plant closings, supervisor-employee ratios, and employee stock-option and profit-sharing plans. The decisions on some of these issues, as will be discussed later, would not normally be subject to mandatory collective bargaining under existing law.

The Chrysler situation was not a fluke. Other companies have since agreed to worker participation on their company boards, although the phenomenon has been mostly limited to companies in severe financial distress due to foreign competition or deregulation, such as the airline, trucking and steel industries. In the airline industry, six airlines now have worker representatives on the board of directors as a result of the collective bargaining process.[10] In 1981, Pan American Airlines was the first airline to agree to such an arrangement.[11] More recently, Eastern Airlines and its unions agreed on what appears to be the most comprehensive arrangement for worker participation on a board of directors.

Eastern is one of the nation's largest airlines, with almost 38,000 employees, divided into machinists, pilots, flight attendants, and nonunion workers. The company was in significant financial danger, having lost about 75 million dollars in 1982[12] and 128 million dollars from January through September of 1983.[13] Because of this, employees agreed to take a one year pay cut of approximately eighteen percent in return for stock worth approximately twenty-five percent of the company and the right to designate four members for appointment to the company's nineteen member board of directors, one from each of the four major employee groups.[14] There are several other elements to these agreements:

1) *Union Choice of Director.* Management agreed to support the unions' nominations for director, thereby making it clear that the choice of the represen-

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[8] *Id.*

[9] *Id.*

[10] *Developments*, EMPLOYEE OWNERSHIP, December 1983, at 4.

[11] Olson, *Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPS, TRASOPS, Stock Purchases and Cooperatives*, 1982 WIS. L. REV. 729, 778.

[12] N.Y. Times, May 11, 1983, at D1, col. 4.

[13] N.Y. Times, Dec. 9, 1983, at A1, col. 4.

[14] The agreements are contained as appendices to the Eastern Air Lines, Inc., Proxy Statement of April 24, 1984, and are further summarized in the Eastern Air Lines, Inc., Prospectus, 1984 Wage Investment Program.

tative resides with the unions and not management. This differs from the Chrysler situation, where Chrysler maintained that the director is still selected by management, and in fact a question existed as to whether Owen Bieber, the successor to Doug Frazier, would be selected to serve on the Chrysler Board.[15]

2) *Director Representing Non-Union Employees.* One of the directors is selected by employees not represented by any union, thereby addressing the concern of some that unrepresented employees as well as union employees be represented at the board of directors level.[16]

3) *Union Participation in Business Decisions.* The agreements established a plan to allow the employee groups to review, comment and make suggestions about issues regarding business plans and major capital expenditures, and for union participation with the company in the construction of new facilities, the remodeling of existing ones, and in the development of such new designs and plans. The agreement stated that the intent "is to encourage the participation of employee groups in the development of business strategies and major investments."[17] In calling for such extensive employee and union participation in decisions concerning items which normally would not be considered mandatory subjects of bargaining, the collective bargaining process in this relationship is moving faster than, and perhaps in an opposite direction from, the law of collective bargaining.

The parties further agreed that if the unions feel a proposed decision is not in the best overall interest of Eastern, "they will appear before the Board of Directors to register their dissent prior to the decision of the Board on those decisions requiring board approval. The Board minutes shall reflect the specific dissent position and rationale presented by the Union."[18]

4) *Productivity Improvement, Employee Involvement, and Job Security.* Provisions were made to establish a five percent improvement in productivity as well as an extensive employee involvement program. No jobs are to be lost due to improvements in productivity.[19]

5) *Full Information.* The plan calls for unlimited union access to financial data, a provision which cannot be over-emphasized in discussing the establishment of the Eastern plan. The president of one of the unions, the Machinists Union, previously had expressed skepticism toward the notion of workers participating on boards of directors.[20] However, after Eastern agreed to independent audits of its financial condition and was fully cooperative in providing the information desired

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[15] 116 LAB. REL. REP. (BNA) 92 (1984).

[16] Summers, *supra* note 5, at 161.

[17] Eastern Air Lines Proxy statement, *supra* note 14, at C-3, D-4, E-3.

[18] *Id.*

[19] *Id.*

[20] Summers, *supra* note 5, at 155.

by the union, and after the union obtained the right to participate in future business decisions, the Machinists Union and the other unions agreed to a settlement designed to keep the company in business.

The Eastern plan was implemented in 1984, and so the result of these efforts are not yet known. However, it was estimated that during 1984 the agreement would save 330 million dollars in wages and yield 87 million dollars in productivity gains.[21] Of course, the outcome will be dependent partly on the success of the airline industry as a whole, as well as on any agreement negotiated between Eastern and its employee groups. However, the features described will, at a minimum, set a precedent for companies and unions which might consider such plans in the future.

Will employee membership on company boards of directors become part of the mainstream in American industrial life? Professor Summers, in a 1982 article, set out a theoretical basis by which employee representation on boards might be integrated, by statute, into the American industrial relations system, taking into account our own social, political, and economic traditions.[22] But even if no statute is adopted, it appears that unions will demand and, in some cases, obtain representation on boards of directors. With respect to legal issues, the National Labor Relations Board's (NLRB) General Counsel sustained Douglas Frazier's appointment to the Chrysler board, stating that there was no unlawful conflict of interest or employer domination, and the Federal Trade Commission (FTC) has likewise sustained the arrangement under antitrust laws.[23] While all of the legal questions under corporate law, antitrust law, and the Landrum-Griffith Act have not been answered,[24] it appears that there will be continuing experimentation with this form of worker participation in the United States. In fact, to the extent that courts have circumscribed the subjects of collective bargaining and access to information under the National Labor Relations Act, union leadership may find it more and more necessary to resort to this demand in order to obtain information and input they find necessary to effectively represent their members.

B. *Worker Ownership*

Americans have previously experimented with worker ownership. The movement began with cooperatives,[25] but in the last decade there has been substantial

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[21] N.Y. Times, Dec. 9, 1983, at A1, col. 4.

[22] Summers, *supra* note 5, at 161.

[23] For discussions of these and other legal issues, see Goldman, *Worker Participation in Decisions Within Undertakings (Nat'l Report, U.S.A.)*, 1 PROC. OF THE TENTH INT'L CONGRESS OF THE INT'L SOC'Y FOR LAB. L. AND SOCIAL SEC. 406, 415 (1984); Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 683 (1983); *see also* W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 97 (1984); Olson, *supra* note 11, at 780.

[24] Olson, *supra* note 11, at 780.

[25] *See, e.g.*, Guzda, *Industrial Democracy: Made in the U.S.A.*, 107 MONTHLY LAB. REV. 26, 27 (1984).

support for employee stock-ownership plans (ESOPs). The charge has been led by Senator Russell Long of Louisiana, an acknowledged master of the tax code. Senator Long and other supporters promote employee ownership to:

1) foster economic democracy within the private sector;

2) increase productivity; and

3) create a more equitable distribution of wealth by giving employees a share of the capital assets of this country.[26]

Since 1974, Congress has created a formidable array of tax and other incentives to encourage the formation of employee ownership, participation in, and, in some cases control of, businesses. The Employee Retirement Income Security Act of 1974[27] created a formal structure for Employee Stock Ownership Plans, ESOPs. That act provided ESOPs with exemptions from certain requirements applicable to other benefit plans such as pensions and profit-sharing; it provided ESOPs with unique authority among employee benefit plans to borrow money, along with requiring ESOPs to invest primarily in employer securities; and it provided that contributions are tax deductible. In 1975, Congress created the Tax Reduction Act Stock Ownership Plan, TRASOP.[28] This plan provided that companies could get an additional one percent credit over and above the ten percent investment tax credit if an amount equal to at least one percent of the qualifying investment was contributed to an ESOP which met the requirements of the Act, including immediate vesting and allocation according to salary. Congress included in the Revenue Act of 1978[29] a provision that allowed the employer an additional one-half percent credit if an employee contribution equal to one-half percent of the qualifying investment was matched by the employer. The Revenue Act of 1978[30] made voting rights mandatory. For publicly traded companies, plan participants must be able to vote all their allocated shares and, in closely held companies, votes must be passed through on issues which by state law or corporate charter require more than a majority vote. In 1980, as part of the Chrysler Loan Guarantee Act,[31] Congress required Chrysler to establish an ESOP and contribute to it 162.5 million dollars in Chrysler stock over a four year period. Significant changes were also made as a part of the Economic Recovery Tax Act of 1981.[32] The TRASOP was replaced with the Payroll-Based Credit for Establishing Employee Ownership Plan (PAYSOP).

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[26] *See, e.g.* Address by Senator Russell Long, *Employee Ownership and Better Labor-Management Relations*, Second National Labor-Management Conference (June 6, 1984).

[27] Pub. L. No. 93-406, tit. I, §2, 88 Stat. 829, 832 (1974) (codified at 29 U.S.C. § 1001 (1974)).

[28] Pub. L. No. 94-12, § 301, 89 Stat. 26, 36 (1975).

[29] Pub. L. No. 95-600, § 141, 92 Stat. 2763, 2787 (1978).

[30] Pub. L. No. 95-600, § 143, 92 Stat. 2763, 2796 (1978).

[31] Pub. L. No. 96-185, § 7, 93 Stat. 1324, 1330 (1980).

[32] Pub. L. No. 97-34, § 331, 95 Stat. 172, 289 (1981).

Under the PAYSOP, a company receives a tax credit equal to one-half percent of payroll for contributions to a PAYSOP of at least that amount in 1983 and 1984. In 1985-1987, the credit increases to .75 percent. The Act also calls for immediate vesting, a prohibition against providing more than one-third of the benefits to officers, ten percent shareholders, or highly compensated employees. The new law also allowed all of the interest portion of the contribution and an amount up to twenty-five percent of payroll for the principal portion to be deducted. In addition, the Act required ESOPs to offer employees the right to demand the company buy back their stock at fair market value where the stock is not publicly traded and allowed companies whose stock is substantially owned by employees to require that departing employees sell their stock back to the company at fair market value (so as to retain employee control). In the Trade Adjustment Assistance Act Amendments of 1983,[33] Congress provided that preference under the Act with respect to loans, loan-guarantees, and technical assistance to firms adversely affected by foreign competition, will be given to companies which channel at least twenty-five percent of any assistance through an ESOP.

State laws have also recently have been passed to encourage employee-owned businesses. In California, a 1982 law[34] declares that the policy of the state is to encourage employee ownership, and the Employee Ownership Act of 1983[35] requires the State Department of Economic and Business Development to assist employee buy-outs by providing revenue bond based financing for the purchase of a plant, permitting the continuation of unemployment benefits while buy-out negotiations continue, and making state employment training funds eligible for state training money. Last year New York directed its Department of Commerce to assist employee-owned enterprises in various ways,[36] including the issuance of bonds to help finance employee buyouts at rates below prime.[37] Other states with new laws encouraging employee ownership include Illinois,[38] Michigan,[39] Delaware,[40]

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[33] Pub. L. No. 98-120, 97 Stat. 809 (1983).

[34] 1982 Cal. Legis. Serv. 8244 (West).

[35] Employee Ownership Act, 1983 Cal. Legis. Serv. 5347 (West).

[36] 1983 N.Y. Laws 1476 (McKinney).

[37] *Id.*

[38] Employee Ownership Assistance Act, ILL. ANN. STAT. ch. 48 §§ 1303-1313 (Smith-Hurd 1984-1985) (This is an act allowing the Illinois Department of Commerce to grant state loans to encourage employee takeover and ownership of closing industrial plants. To qualify, the firm must be 60% employee owned and employees must be allowed to vote their shares.).

[39] MICH. COMP. LAWS ANN. § 450.751 (West 1984) (This is an act which aids employees in conducting feasibility studies, negotiating buyouts, and locating technical and financial assistance. The Act does not provide for loans or other financial aid. To qualify, the purchase plan must have at least a majority of employee owners with full voting rights.).

[40] Delaware Employee Ownership Act, DEL. CODE ANN. tit. 29, § 6508 (1981) (requires state agencies involved in economic affairs to report annually on what they have done to encourage employee ownership).

Maryland,[41] Massachusetts,[42] New Hampshire,[43] and New Jersey.[44] Several of the states, such as New York[45] and Illinois,[46] require assisted companies to be owned and controlled by a majority of the employees.

Certain 1984 tax provisions will help boost the ESOP concept further. They provide for deduction of the cost of dividends ESOPs pay to employees, taxing only half of the interest income for banks that loan money to firms to set up ESOPs, and allow ESOPs to assume liability for state taxes in exchange for stock.[47]

All of this legislation has had its desired effect. There are now over 6,000 employee-ownership plans in the United States.[48] As of May, 1984, there were at least 600 companies in which a majority of the stock is owned by a majority of their employees who have full voting rights,[49] more than double the number of such plans only three years ago.

There are several reasons for creating an ESOP plan. One reason is to provide employees an additional fringe benefit. For example, the Lowes Company, which operates mostly in the South, has been contributing stock regularly so that the

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[41] MD. ANN. CODE of 1957 Art. 41, § 14J (Repl. Vol. 1982) (This is an act declaring broadened ownership of capital an important state policy and finding that ESOPs are an important means of achieving that goal. The Act requires various state agencies to report on what steps they have taken to encourage broadened ownership.); MD. CORPS. & ASS'NS CODE ANN. § 11-602 (1984 Supp.) (an act exempting sales of stock to an ESOP from Maryland state securities registration requirements); MD. CORPS. & ASS'NS CODE ANN. § 11-902 (1984 Supp.) (amendments to Maryland Corporate Takeover Statutes allowing the State Securities Commissioner to require notice to employees of takeover efforts); MD. ANN. CODE OF 1957 Art. 81, § 8 (1984 Supp.) (an act allowing utilities to keep tax credits received by forming ESOPs rather than passing the credits to consumers).

[42] MASS. ANN. LAWS ch. 156B, § 40 (Michie/Law, Co-op. 1983).

[43] N.H. REV. STAT. ANN. § 162-L:2 (1983) (an act creating a community development finance authority which promotes ESOPs by providing technical assistance and loans).

[44] N.J. STAT. ANN. § 52:27 H-90 (West 1984-85 Supp.) (authorizes New Jersey Commissioner of Commerce to disseminate information on ESOPs to employees).

[45] *See supra* note 36.

[46] *See supra* note 38.

[47] Senator Long's proposals passed as part of the Tax Reform Act of 1984. The legislation includes: 1) tax-free rollover of the proceeds from the sale of a business to employees where the proceeds are reinvested in another business within one year and at least 30% of the employer securities are held by an ESOP or Co-op, I.R.C. § 1042 (1984); 2) deductions for cash dividends paid currently to employees holding ESOP stock, I.R.C. § 404 (1984); 3) provisions allowing commercial lenders to exclude from income 50% of interest received on loans to ESOP companies, I.R.C. § 133 (1984); 4) provisions allowing an ESOP to assume liability for estate taxes, provided the sponsor company guarantees payment of the taxes over an extended schedule, I.R.C. § 2210 (1984); and 5) a freeze in the scheduled increase in tax credit available for ESOP contributions at 0.5% through 1987, I.R.C. § 41 (1984).

[48] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, EMPLOYEE OWNERSHIP: A LEGISLATIVE GUIDE TO EMPLOYEE OWNERSHIP 2 (1984).

[49] C. Rosen, Speech at the National Labor-Management Conference 4 (June 5, 1984) (available from the National Center for Employee Ownership).

employees now own twenty-five percent of the company and people who leave might have amounts in six figures or more.[50] In the sale of U.S. News and World Report, whose employees held most of the company stock, long time employees, including a chauffeur and a clerk, will collect $400,000 or more.[51]

Another reason for creating an ESOP is to allow employees to purchase the stock of an owner who might be retiring or otherwise leaving the company, without liquidating the firm for a cash value or selling to someone who wouldn't continue the business in the same way that its founder did.[52]

A third reason for creating on ESOP is to borrow money, since an ESOP allows the company to borrow through the ESOP fund and thus be able to deduct the principal as well as the interest parts of the ESOP loan. In borrowing from an ESOP a company can borrow money less expensively, and the same dollars used to raise new capital are being used to fund an employee benefit plan.[53]

The most publicized use of an employee ownership plan is where employees of a failing company, take wage concessions or buy the company outright. It has been estimated that there are between 100 to 120 such cases, about two percent of the total number of employee ownership plans in the United States.[54] Although this is a fairly small percentage, these are important examples, because the companies tend to be quite large and they involve saving jobs. There have been about 60 outright employee buyouts for the purpose of saving jobs since 1971[55] and about 55 of them are still in business as a result of having been able to turn around the business,[56] including some dramatic turnarounds. Weirton Steel, a large West Virginia steel manufacturer that recently became employee-owned, declared its first quarterly profits in two years.[57] Hyatt Clark Industries in New Jersey employed 800 workers when the buyout was completed and now employs 1530 workers.[58] Employees now own or are scheduled to own fifteen percent or more of the stock in at least six airlines.[59]

Being employee-owned does not immunize a company from the adverse influences of the market place, however. Rath Packing Company, another well

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[50] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, *supra* note 48, at 8.

[51] *How to Plan to Repurchase Stock from Departing Employees*, EMPLOYEE OWNERSHIP, June, 1984, at 4.

[52] C. Rosen, *supra* note 49, at 6.

[53] *Id.* at 7.

[54] *Id.*

[55] *Id.* at 8.

[56] *Id.*

[57] *Developments, supra* note 10.

[58] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, *supra* note 48, at 6.

[59] *Developments, supra* note 10, at 6.

known buyout situation, entered Chapter 11 bankruptcy proceedings due primarily to adverse market conditions.[60]

Many union leaders are taking Senator Long's advice to ask for employee stock ownership as a part of the negotiation process. A recent report in the Harvard Business Review stated that thirty-five percent of the collective bargaining agreements studied which involved wage concessions also involved providing at least some stock ownership to employees.[61] In addition to the auto and airline industries, three of the major trucking lines have offered employees close to half of their stock in return for wage concessions.[62] U.S. Sugar, the nation's largest sugar company, has set up an ESOP in which workers will own about forty-seven percent of the firm.[63]

Of course employee ownership does not necessarily mean employee direction. However, the Congress and state legislative bodies, as well as unions and employees, are becoming more sophisticated concerning employee control under such circumstances. Framers of such plans now give careful attention to the passing through of votes to the employees themselves or to an employee or union trust, or, as in the Weirton Steel plan, providing employees with a vote on a one person, one vote basis on most issues, even though stock is allocated according to relative pay.[64] For example, the Atlas Chain Company, organized by the United Auto Workers, was faced with closure in 1982.[65] The UAW began examining the possibility of a buyout, but demanded worker control as well as worker ownership. The union was able to gain control with four members of the seven member board of directors.[66] Although it has not normally been possible for unions to gain majority control, the union very often is able to obtain some representation on the board of directors along with worker ownership and control of stock.

Much more research is necessary with respect to the impact of employee ownership and control on worker satisfaction, productivity, worker involvement on the job, pay equity, pay satisfaction, job security, and the like. A 1978 study published by the University of Michigan Survey Research Center[67] found that companies with employee stock option plans were 150 percent as profitable as comparable conventional companies without them. A 1980 study reported in the Journal of Corporation Law[68] found that employee ownership companies had twice the average annual productivity rate between 1975 and 1979 of comparable conventional companies

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[60] NATIONAL CENTER FOR EMPLOYEE OWNERSHIP, *supra* note 48, at 12.

[61] *Mills, When Employees Make Concessions* HARV. BUS. REV. 103 (May-June, 1983).

[62] *Developments*, supra note 10.

[63] *Id.* at 5.

[64] *Id.* at 4.

[65] 1 EMPLOYEE REL. WEEKLY, 451 (1984).

[66] *Id.*

[67] M. CONTI & A. TANNEBAUM, EMPLOYEE OWNERSHIP (1980).

[68] Marsh & McCallister, *ESOPS Tables: A Survey of Companies with Employee Stock Ownership Plans*, 6 J. CORP. L. 551 (1981).

studied. A 1983 study[69] found that majority employee-owned companies generated three times more net new jobs than comparable conventional companies. These preliminary studies, as well as the increasing popularity of such plans, indicate that stock ownership plans may be a significant factor in increasing worker participation in America. However, further studies are necessary.

C. *Other Forms of Worker Participation: Quality of Work Life Programs, Quality Circles, Productivity Gain Sharing and Profit Sharing*

1. Quality of Work Life Programs

Over the last decade a variety of joint efforts between employers and unions, at both the company and shop floor level have come to be known as "quality of work life" programs.[70] These programs have been aimed at restructuring the work place to provide for greater worker satisfaction, greater participation in decisionmaking on the job, constructive interaction with fellow workers, and improved organizational performance and quality. A good example of a company-level effort is described in the agreement between AT&T and the Communication Workers of America establishing a quality of work life program.[71] This agreement contains the following principles which have generally come to be associated with the quality of work life movement:

1) *Goals.* The agreement states that "the essential component of a Quality of Work Life (QWL) effort is a process which increases employee participation in the decisions which affect their daily work and the quality of their work life."[72] It states that the goals of quality of work life efforts are "to employ people in a profitable and efficient enterprise,"[73] and "to create working conditions which are fulfilling by providing opportunities for employees and groups at all levels to influence their working environment."[74] It stresses "the basic human values of security, fairness, participation and individual development."[75] It states as a basic tenant of QWL that "employees are responsible, trustworthy, and capable of making contributions when equipped with the necessary information and training,"[76]

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[69] NATIONAL CENTER FOR EMPLOYMENT OWNERSHIP, CHARACTERISTICS AND EMPLOYMENT PERFORMANCE OF MAJORITY EMPLOYEE OWNED COMPANIES 6 (1983).

[70] *See generally*, INSTITUTE FOR SOCIAL RESEARCH, MANAGEMENT-LABOR COOPERATION IN QUALITY OF WORKLIFE EXPERIMENTS: COMPARATIVE ANALYSIS OF EIGHT CASES (1984) (a technical report to the U.S. Department of Labor examining Quality of Worklife Programs over the last 11 years) [hereinafter cited as INSTITUTE].

[71] Reprinted in pertinent part in I. SIEGAL AND E. WEINBERG, LABOR-MANAGEMENT COOPERATION: THE AMERICAN EXPERIENCE 276 (1982).

[72] *Id.* at 280.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

and that the parties seek to develop the potential of all employees.[77]

2) *Information.* The parties also commit themselves to provide the necessary information to insure the success of the quality of work life programs.[78] The necessity to share in the fullest range of information is an element which commentators, unions, and employers have all acknowledged to be a critical feature of a successful quality of work life program.[79]

An American Can Company vice-president, talking about such a program with the Steelworkers Union, said "a key to the relationship is an almost complete sharing of information."[80] He stated "we give the union any piece of information it wants,"[81] stating that such openness makes bargaining easier.[82]

3) *Supplement, Not Substitute, for Collective Bargaining.* The AT&T/C.W.A. agreement provides that QWL efforts must be viewed as a supplement to the collective bargaining process, and states that "the integrity of the collective bargaining process, the contractual rights of the parties and the working of the grievance procedure must be upheld and maintained."[83] A recent survey of quality of work life programs indicated that this feature is a common element of QWL programs.[84]

4) *Job Security.* The AT&T agreement provides that "innovations which result from the QWL process will not result in the layoff of any regular employee or negatively affect the pay or seniority status of any Union eligible employee, whether he or she is a participant in the process or not."[85]

5) *Mutual Respect and Trust.* The agreement states that "the success of QWL efforts requires a spirit of mutual respect and trust among employees, management and the union."[86] Others have also emphasized that QWL works best when there is no threat to the bargaining relationship, and QWL will not work at all when the effort is viewed as an attempt to undermine the union.[87] The attitude of union leaders toward QWL tends to be dependent in part on whether management has accepted and recognized unions and the collective bargaining process.[88]

6) *Support and Leadership.* The agreement states that the success of QWL requires continuing support and leadership from management, unions and employees

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[77] *Id.*
[78] *Id.* at 281.
[79] *Innovative Approach to Collective Bargaining*, 115 LAB. REL. REP. (BNA) 141, 143 (1984).
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] I. SIEGAL & E. WEINBERG, *supra* note 71, at 280.
[84] INSTITUTE, *supra* note 70, at 355.
[85] I. SIEGAL & E. WEINBERG, *supra* note 71, at 280.
[86] *Id.* at 281.
[87] INSTITUTE, *supra* note 70, at 378.
[88] *Id.*

at all levels.[89] Others have also emphasized that the success of such efforts depends on whether there is solid support both at the leadership level and at the worker level.[90]

Today over 1,000 quality of work life plans exist at former Bell system companies.[91] It is reported that the plans have not been adversely affected by a three week nation-wide strike or by the breakup of the Bell company.[92]

Other major industries with quality of work life programs are the auto and steel industries.[93] In the auto industry, provision for such QWL programs have been established since about 1973.[94] General Motors, for example, has about 100 quality of work life programs operating through about 300 committees,[95] and the growth in these programs since their inception in the 1973 contract has been consistently steady in both high profit and no profit times, although not without occasional setbacks in individual plants.[96] Similar programs have been established in the steel industry under an agreement with the United Steelworkers to establish Labor-Management Participation Teams (LMPT). These plans have had mixed success depending upon the steel company involved.[97]

The federal government is encouraging efforts such as QWL and labor-management cooperation. On May 1, 1984, the President's Commission on Industiral Competitiveness (PCIC) issued recommendations which emphasize the need for greater labor-management cooperation and new collaborative efforts to maximize productivity through open communication and worker participation.[98] In 1984, the Federal Mediation and Conciliation Service planned to distribute one million dollars in funding for labor-management committees under the Labor Management Cooperation Act of 1978.[99] Committees eligible for funding are those organized jointly by employers and labor organizations "for the purpose of improving labor/management relationships, job security, organization effectiveness, enhancing economic development or involving workers in decisions affecting their job including improving communication with respect to subjects of mutual interest and concern."[100]

What is the extent of these programs? According to a recent New York Stock

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[89] I. SIEGAL & E. WEINBERG, *supra* note 71, at 281.
[90] INSTITUTE, *supra* note 70, at 373.
[91] *Innovative Approach to Collective Bargaining, supra* note 79, at 142.
[92] *Id.*
[93] INSTITUTE, *supra* note 70, at 366.
[94] *Id.*
[95] *Suspension of Quality of Work-Life Program at GM*, 114 LAB. REL. REP. (BNA) 226 (1983).
[96] *Id.*
[97] *Innovative Approach to Collective Bargaining, supra* note 79, at 142.
[98] *Industrial Competitiveness Commission's Report*, 116 LAB. REL. REP. (BNA) 36 (1984).
[99] *FMCS Funds For L-M Committees*, 114 LAB. REL. REP. (BNA) 294 (1983).
[100] *Id.*

Exchange report entitled "People and Productivity: A Challenge to Corporate America,"[101] fourteen percent of all companies employing one hundred or more people were involved in some kind of quality of work life effort. This fourteen percent, however, employed fifty-two percent of the American work force. The study found a twenty percent increase in productivity as a direct result of the effort.

Will the QWL movement last? Some say yes, arguing that the country has experienced a permanent economic upheaval which will force companies and unions to cooperate on a permanent basis for survival.[102] Others argue, however, that America has always had a checkered history of labor-management cooperation, with cooperation existing during economic bad times but then disappearing with economic prosperity.

2. Quality Circles: Worker Participation Groups at the Shop Floor Level

Quality of work life programs often include the establishment of worker participation groups at the shop floor level, variously called quality circles, employee involvement teams, or autonomous work groups. These programs normally have the dual goals of increasing the quality of output while also improving job satisfaction and productivity. Participation groups vary widely in their power to make decisions and implement change, but what little evidence exists suggests that their potential effect depends on the extent to which they assign decision-making responsibility to those closest to the work. A recently completed study of such groups concluded that:

> Participation group processes which are designed to utilize the ideas of those closest to the work can be expected to have the greatest impact on the quality of employees' work lives and on the desired organization outcomes. Typically this means turning over some important decisions to the individuals who do the work.[103]

While the results are mixed with respect to the success of worker participation groups, Siegel and Weinberg, in their recent work on labor-management cooperation, conclude that:

> Companies that have had satisfactory results with quality circles cite monetary and nonmonetary net gains, direct and indirect. At the end of its first three years of experience with quality circles, Lockheed estimated that the savings of the program were about four times the cost of operating it. An attitude survey conducted at Westinghouse found unanimous support for continuation and extension of the circle

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[101] NEW YORK STOCK EXCHANGE, PEOPLE AND PRODUCTIVITY: A CHALLENGE TO CORPORATE AMERICA (1983).

[102] Nowak, *Worker Participation and its Potential Application in the U.S.*, 35 LAB. L.J. 148 (1984); *see also* WORK IN AMERICA INSTITUTE INC., PRODUCTIVITY THROUGH WORK INNOVATIONS 4 (1982).

[103] LAWLER & MOHRMAN, QUALITY OF WORK LIFE 33 (1984).

> program. In addition to the accomplishment of their explicit primary purpose, circles are credited with contributions to higher productivity, better methods of production, improved communications and morale, greater safety, fuller utilization of worker capabilities, and development of leadership skills transferable to other settings.[104]

A study of hospital quality circle programs recently concluded:

> In terms of six goals enumerated by the study—improved communications, improved cooperation, employee involvement, improved quality of care, improved operations and cost containment—the study found that six percent of the hospitals related neutral results, thirty-eight percent positive results, and fifty-four percent were very positive results.[105]

Apparently there are several thousand quality circle groups in the United States, still a small number compared to the 600,000 estimated to exist in Japan.[106]

3. Productivity Gain-Sharing and Profit-Sharing

Gain-sharing plans have drawn increasing interest as a means of obtaining greater worker participation and in sharing economic gains among the workers who helped produce them.[107] The plans involve measuring labor productivity through a variety of techniques, and then sharing a bonus based on measured improvements in productivity. Typically such programs also include other forms of employee involvement and cooperation, and they attempt to foster creativity and team work by linking monetary rewards to increases in the productivity of the entire establishement. The best known plan was developed by Joe Scanlon, a steel worker and union president, in the late 1930s. His notion was that collective bargaining could serve as a framework for reconciling management's desire for increased bargaining could serve labor's desire for a fair share of the economic benefits resulting from productivity gains.[108] His gain-sharing plan, as well as newer plans such as Rucker and Improshare, have been utilized with some success for quite a few years.[109] One report depicts the Scanlon plan as producing the most readily-seen results more quickly for more employees than many other reforms in work organization. The authors state:

> First, Scanlon Plans do not depend heavily for survival on the continuance on the job of a single supportive manager, management, or union official, who is subject to change. Everyone has a visible, measurable stake in its continuation, the monthly

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[104] I. SIEGAL & E. WEINBERG, *supra* note 71, at 135.
[105] *Study of Hospital Quality Circle Programs*, 116 LAB. REL. REP. (BNA) 96 (1984).
[106] I. SIEGAL & E. WEINBERG, *supra* note 71, at 132.
[107] LAWLER & MOHRMAN, *supra* note 103, at 39.
[108] I. SIEGAL & E. WEINBERG, *supra* note 71, at 180.
[109] *See generally*, B. GRAHAM-MOORE & T. ROSS, PRODUCTIVITY GAINSHARING (1983).

> bonus check. Second, Scanlon Plans are agreed [to] voluntarily by both union and management outside the contract and must be accepted by a substantial majority of all employees. Third, as soon as they are adopted, Scanlon Plans reach everyone from the plant managers to the sweeps.[110]

Normally, gain-sharing plans utilize a series of committees to consider and implement employees' suggestions for productivity improvement. A formula is then agreed to for the return of some portion of gain to the employees in an equitable manner. A recent study concluded that: "Overall, there is an impressive amount of evidence attesting to the success of gain-sharing plans. In general, they provide a foundation for greater employee involvement in the organization—involvement that is both financial and psychological."[111]

Profit-sharing plans are based on employees receiving a fixed percent of the annual net profits rather than on any relationship to productivity gains. Moreover, profit-sharing plans do not necessarily involve worker participation either in management decisionmaking or in shop floor consultation. Nonetheless, some unions view profit-sharing as a good method of obtaining a "piece of the equity." The profit-sharing foundation has estimated that, as of the end of 1980, about 15 million employees were enrolled in some 380,000 profit-sharing plans.[112] In recent years some unions and companies have negotiated profit-sharing arrangements in return for union concessions.[113] In 1958, when Walter Reuther proposed a profit-sharing plan to the auto companies, the companies responded by calling the notion "extravagant" and "foreign to the concepts of the American free enterprise system."[114] In 1981 and 1982, the big three auto makers agreed to profit-sharing plans in return for union concessions, and recently payments were made amounting to several hundred dollars per employee.[115] Nonetheless, in the last round of bargaining the profit-sharing arrangement came under attack due to the large bonuses paid to G.M. and Ford executives.[116] One of the elements necessary for such a plan to be successful is that the profits be shared equitably. In this situation, workers understandably tend to discount a few hundred dollars compared, for example, to the $1.5 million dollars bonus paid to the chief executive of General Motors.

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[110] Batt & Weinberg, *Labor-Management Cooperation Today*, HARV. BUS. REV., Jan/Feb, 1978 at 102.

[111] LAWLER & MOHRAN, *supra* note 103, at 44.

[112] I. SIEGAL & E. WEINBERG, *supra* note 71, at 189.

[113] *See, e.g., Long-Term Impact of Concession Bargaining*, 115 LAB. REL. REP. (BNA) 74,75 (1984).

[114] Shaw, *Cooperation for Needed Reductions in High Labor Costs*, PROCEEDINGS OF N.Y.U. 35TH ANNUAL NATIONAL CONFERENCE ON LABOR, 105, 110 (1983).

[115] *GM Profit Sharing of $322 Million*, 115 LAB. REL. REP. (BNA) 123 (1984); *Profit-Sharing at Ford Motor*, 115 LAB. REL. REP. (BNA) 144 (1984).

[116] *Suspension of Quality of Work-Life Program at GM*, *supra* note 95 at 225.

III. The Law of Collective Bargaining as a Possible Impediment to Worker Participation

There are several possible impediments to worker participation under the National Labor Relations Act. However, this discussion will be limited to impediments relating to information disclosure and subjects of bargaining.

A. *Information Disclosure*

The ability of workers to participate in company decisions will always be limited so long as they are unable to obtain financial information about the company, including profits, costs, production figures, and other information concerning an employer's ability to pay or to operate effectively.

All of the programs for worker participation previously discussed depend for their success on the sharing of information concerning the company's operation and financial conditions. Unions are unwilling to agree to wage concessions in return for membership on boards of directors or stock ownership unless the company is completely honest and open with respect to its financial condition. Virtually all of the academic, union, and management representatives commenting on quality of work life programs also emphasize the importance of information sharing to achieve organizational and worker goals. Yet the duty to provide information under the National Labor Relations Act is limited. Unless an employer claims an inability to pay, there is no duty to divulge financial information such as profits, costs, sales, and production levels.[117] The result is that employers simply avoid claiming an inability to pay, unless they find that the information might be useful to persuade the union to make concessions. In requiring financial disclosure the United States is far behind many foreign competitors.[118]

These information limitations inhibit the development of worker participation and labor-management cooperation in America. Experience demonstrates that workers and their representatives are much more likely to cooperate with cost-saving measures, worker productivity and the like when they have enough information to allow them to make sensible and intelligent judgments about the condition and operations of the company. In fact, if the financial and other information available to union members who serve on company boards of directors was available through the collective bargaining process, it is likely that unions would be much less interested in serving on such boards.

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[117] NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956); Empire Terminal Warehouse Co., 151 NLRB, 1359 (1965), *aff'd sub nom*, Dallas Gen. Drivers Local 745 v. NLRB, 355 F.2d 842 (D.C. Cir. 1966); Caster Mold & Machine Co., 148 NLRB 1614 (1964).

[118] *See, e.g.*, R. Blanpain, *Information and Consultation*, in Comparative Labor Law and Industrial Relations 208 (R. Blanpain ed. 1982).

B. *Limited Subjects of Bargaining*

The Supreme Court's distinction in the *Borg-Warner* case between mandatory and permissive subjects of bargaining[119] has greatly damaged the cause of worker participation and labor-management cooperation.

To the extent that the mandatory category does not include items of importance to employees, and to the extent that employers may make decisions on such matters without consulting employees, worker participation is diminished. In this sense, the language contained in *First National Maintenance*[120] may further diminish such worker participation. Although the holding of *First National Maintenance* is quite narrow, in that it upheld an employer's unilateral termination of its maintenance contract with a nursing home,[121] its language clearly creates a stumbling block to worker participation through collective bargaining. The Court stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[122] It is not clear how bargaining over matters affecting member's jobs would make the union an equal decisionmaker since management still makes the final decisions in the event of a bargaining impasse. The Court also expressed a clear preference for unilateral managerial decisionmaking rather than collective bargaining when it stated that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[125] It also stated:

> [I]n view of an employer's need for unemcumbured decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor management relations and the collective bargaining process, outweigh the burden placed on the conduct of the business.[124]

The Court concluded "that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision."[125] The Court expressly intimated no view as to "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc."[126] The Court also noted that employees still had the right to bargain over the effects of the shutdown.[127]

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[119] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).
[120] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).
[121] *Id.* at 669.
[122] *Id.* at 676.
[123] *Id.* at 678-79.
[124] *Id.* at 679.
[125] *Id.* at 686 n.22.
[126] *Id.*
[127] *Id.* at 681-82.

However, in a 1984 NLRB decision, *United Technologies*,[128] the Board seems to have limited the mandatory subjects of bargaining even further. The actual holding was that the decision of an employer to consolidate and transfer research and development functions from one facility to another is not a mandatory subject of bargaining. However, the main opinion by Chairman Dotson and member Hunter elaborated on some management decisions not considered in *First National Maintenance*. The opinion states that for the reasons given in *First National Maintenance*, management's need for predictability, flexibility, speed, secrecy, and to operate profitably, decisions which "affect the scope, direction, or nature of the business" are not mandatory subjects of bargaining.[129] It was further stated that such decisions include "decisions to sell a business or a part thereof, to dispose of its assets, to restructure or to consolidate operations, to subcontract, to invest labor-saving machinery, to change the methods of finance or of sales, advertising, product design, and all other decisions akin to the foregoing."[130]

If all of these decisions are removed from the arena of collective bargaining, there is little doubt that collective bargaining as a form of worker participation has been dealt a severe blow. One can hardly call collective bargaining a strong participatory device if it can only deal with the effects rather than the business decisions themselves.

Moreover, the scope of *United Technologies* is unclear. Does it mean that management may refuse to bargain, for example, over union demands which would restrict subcontracting or the restructuring or consolidation of operations, or the introduction of new technology? A literal reading of the cases which create the mandatory/permissive distinction, restrict the scope of mandatory bargaining, and restrict the parties' ability to proceed to impasse on such issues, might suggest such a result. For example, in *First National Maintenance*, the Court stated, in dictum, that labor as well as management may not insist on bargaining a nonmandatory item to the point of impasse,[131] even though *Borg-Warner*, the case creating the mandatory/permissive distinction, involved an *employer* which pushed to impasse, rather than a union. Some lower courts have also held that unions are prohibited from striking or threatening to strike over nonmandatory subjects of bargaining.[132]

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[128] United Technologies v. NLRB, 115 L.L.R.M. (BNA) 1281 (1984).

[129] *Id.* at 1283.

[130] *Id.*

[131] First Nat'l Maintenance Corp., 452 U.S. at 675 n.13.

[132] *See, e.g.*, NLRB v. Local 38, Sheet Metal Workers Int'l Ass'n, 575 F.2d 394, 399 (1978), where a union's threat to strike if interest arbitration was not adopted was found to be unlawful restraint and coercion, due to the nonmandatory nature of the subject; and Lone Star Steel Co. v. NLRB, 639 F.2d 545 (1980), where the court held that an "automatic application of contract" clause was nonmandatory, and that "by striking to achieve agreement on a nonmandatory subject the Union refused to bargain within the meaning of § 8(b)(3) of the Act."

In light of these decisions it is difficult to predict the outcome of a case where, for example, a union engages in a strike to obtain a contract clause which restricts subcontracting, a common enough subject of bargaining. Most observers thought that Congress, in the National Labor Relations Act, as amended, intended to move away from judicially-created "unlawful objects" of strikes when it passed Section 13, protecting strikes, and Section 8(b)(4), which established certain impermissable objects of strikes. Since *First National Maintenance* did not arise in a strike context, but rather as a result of a union refusal to bargain, it can be argued that the right of a union to strike should not be dependent upon judicial or administrative determination of whether the object of bargaining is mandatory or permissive.[133] The Board and courts need to face much more directly the arguments that Section 13 of the NLRA protects such a strike; that Congress, by requiring the parties to bargain over wages, hours, and conditions of employment, never intended those words to limit the right to strike; and that the only limitations which Congress intended were those which it created in Section 8(b)(4) of the Act. These arguments have never been addressed by any court. Moreover, they might never be made, since most unions who seek nonmandatory contract provisions mix them with mandatory items, and simply make no concessions on the mandatory ones unless concessions are given on the nonmandatory.

Nonetheless, the fact remains that *First National Maintenance* and its progeny will often foreclose collective bargaining as an effective vehicle for worker participation in such important decisions as partial closings, subcontracting, and consolidation of operations. Under these circumstances, one should not be surprised to see more union demands for worker participation on boards of directors in an effort to participate in such decisions.

IV. CONCLUSION

Employers and unions, through collective bargaining, are creating new forms of worker participation through worker representation on boards of directors, employee stock ownership, and quality of work life programs. These efforts show the creative capacities of the collective bargaining process, but also reflect some weaknesses in the law of collective bargaining, especially where tribunals have limited the duty to provide information and the scope of bargaining. The Board and courts should consider that to the extent they limit the right of unions to important information, and to the extent they remove important subjects from the scope of bargaining, they limit the effectiveness of collective bargaining as a tool for industrial democracy and worker participation. Moreover, these decisions do not mean that workers will become less interested in such information or participation. Rather, methods other than collective bargaining will be sought to obtain these ends. There

[133] *See, e.g.*, Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in* First Nat'l Maintenance, 58 IND. L.J. 433, 463 (1983).

is little doubt that the demand for forms of worker participation other than collective bargaining stems in part from adjudicatory determinations which have stripped the collective bargaining process of the full force and impact which Congress intended it to have. There also is little doubt that if left to its own free and natural evolution, the collective bargaining *process*, as opposed to the *law* of collective bargaining, would effectively achieve many of the managerial and worker participation goals now being sought by other methods.